Supreme Court, U.S.
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In The
Supreme Court of the United States

ISSAM MOHAMAD GHAZALI,
Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Sixth Circuit Court of Appeals err in ruling that a time-barred political asylum application can still result in a frivolous finding pursuant to 8 U.S.C. § 1158(6)(d)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ISSAM MOHAMAD GHAZALI asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, *ISSAM MOHAMAD GHAZALI, v. Holder*, Docket No., 08-4229 (6th Cir. 2009), is attached to this petition as **Appendix A**. The Decision of the Board of Immigration Appeals (hereafter referred to as "Board" or "BIA" in re: Issam Mohamad Ghazali No. 073577-947 (BIA Motion to Reopen Decision 8-29-2008), are attached to this Writ as **Appendix B**.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment denying the timely submitted petition for review on October 29, 2009. The Petitioner did not seek rehearing before the Sixth Circuit Court of Appeals, but instead filed a Motion for Stay of Removal indicating Petitioner's intent to file a Petition for Writ of Certiorari before this Court. The Motion was granted on November 25, 2009 and the Order is attached herein as **Appendix E**.

This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter at hand is the statutory interpretation of 8 U.S.C. § 1158(6)(d) which allows for the finding that a political asylum application was frivolously filed resulting in a permanent bar of admissibility for an alien.

STATEMENT OF THE CASE

In this action the Petitioner is requesting review by this Court of a Decision of the Sixth Circuit Court of Appeals denying a Petition for Review from an earlier Decision of the Board of Immigration Appeals finding that your Petitioner filed a frivolous political asylum application.

A. The Nature of the Action

The sole issue before this Court is whether a time-barred asylum application can still result in frivolous finding pursuant to 8 U.S.C. § 1158(6)(d); § 208(6)(d) of the INA.

The Petitioner is a male, native and citizen of Lebanon. He was born on August 24, 1960. He was admitted to the United States on or about July 21, 1999 and has essentially remained in the United States continuously since that time. In addition Petitioner currently has four (4) United States citizen children and is the beneficiary of an immigrant petition filed by his U.S. citizen wife. If the frivolous finding remains, Petitioner is permanently banned from obtaining an immigrant beneficiary.

B. The Court of Proceedings and Disposition Below

Petitioner was placed into removal proceedings based upon a Notice to Appear dated October 7, 2003. The essential and crucial fact involving this Notice to Appear was an allegation that Petitioner had remained in the United States beyond June 22, 2001 without authorization in violation of 8 U.S.C. § 1227(a)(1)(B); § 237(a)(i)(B) of the INA.

At a Preliminary Hearing, Petitioner conceded the allegations contained in the Notice to Appear and then proceeded to file an Application for Relief pursuant to the filing Immigration Form I-589, which form is used for political asylum pursuant to 8 U.S.C. § 1158; § 208 of the INA, as well as withholding of removal pursuant to 8 U.S.C. § 1184; § 214 of the INA, and finally for relief pursuant to the United Nations Convention Against Torture pursuant to 8 C.F.R. § 1208.6. As noted in the Oral Decision, Petitioner at that time conceded that his Application for Asylum was not timely and that he was not actually seeking that type of relief.

On September 6, 2006 Petitioner filed an Amendment to his I-589 Application for Asylum essentially claiming that changed country conditions permitted his Application for Asylum to be considered. Specifically 8 U.S.C. § 1158(a)(2)(D) provides that an alien can claim asylum if conditions in his country have changed. This statute is an exception to the general one (1) year time limit as required in 8 U.S.C. § 1158(a)(2)(B); § 208(a)(2)(B) of the INA.

An Evidentiary Hearing occurred on September 20, 2006 where Petitioner's claims for relief were considered and heard by the Court. The Court noted the relief requested being asylum, withholding under 8 U.S.C. § 1231(b)(3), § 241(b)(3) of the INA. and withholding under the Torture Convention . After a brief discussion, the Court then immediately ruled that Petitioner's Asylum Application was untimely. The Court then continued with its lengthy discussion as Petitioner's two (2) withholding claims are not affected by any possible time bar issues.

Notwithstanding the asylum time bar, the Court then considered the frivolous filing issue. The Court determined that the only possible frivolous issue in this case was the fact that it did not accept Petitioner's credibility, believing that he testified inconsistently with his own testimony and others. The Court then noted that it was going to find that the Application was frivolous, but then failed to actually and properly state that in its Oral Decision. However, the Court did in the actual Order form check off the appropriate box for frivolous asylum application.

Petitioner then timely appealed this matter to the Board of Immigration Appeals who affirmed the Immigration Judge's Decision in total. The Board of Immigration Appeals in its decision specifically noted that the frivolous finding was based on the oral testimony of Petitioner at the Evidentiary Hearing.

Subsequent to said ruling, Petitioner filed a Motion for Reconsideration with the Board of Immigration Appeals regarding the frivolous asylum finding.

On August 29, 2008, the Board of Immigration Appeals issued a Decision denying Petitioner's Application for Reconsideration with regard to the time barred frivolous asylum finding. A review of the BIA Decision clearly reflects the fact that they accept that an immigration judge's decision that a frivolous finding can be had in a situation where an immigration judge has determined that an asylum application is untimely and/or subject to a bar as occurred in the case herein

Petitioner filed a timely Request for Review with the Sixth Circuit Court of Appeals from the Board of Immigration Appeals with regard to the Motion for Reconsideration. Petitioner is now requesting that this Honorable Court strike the frivolous finding ruling and remand this case back to the Immigration Court and/or Board of Immigration Appeals based upon the fact that Petitioner is currently eligible for and has filed for supplemental relief, to-wit: Adjustment of Status based upon United States relatives petition.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Court's decision in this case is directly in opposition to the Third Circuit Court in *Luciana v. Attorney General of the U.S.*, 502 F.3d 273, 280 (3rd Cir. 2007). As a result there is a direct conflict on the issue between these two circuit courts as to whether a time-barred asylum application can result in a frivolous finding pursuant to 8 U.S.C. § 1158(6)(d).

ARGUMENT

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN RULING THAT T TIME-BARRED POLITICAL ASYLUM APPLICATION PURSUANT T0 § 1158(a)(2)(B) CAN STILL RESULTIN A FRIVOLOUS FINDING PURSUANT TO 8 U.S.C. § 1158(6)(d)?

Prior to the Sixth Circuit's decision herein, the only other court to have directly considered this issue is the Third Circuit, in *Luciana v. Attorney General of the U.S.*, 502 F.3d 273, 280 (3rd Cir. 2007). Specifically, the *Luciana* Court stated:

> In the case at bar, the falsehood had neither the natural tendency nor the capability of influencing the decision of either the Asylum Officer, the IJ or the BIA. Because Petitioner's asylum application was untimely, she could not be granted asylum unless her case fell under an exception to the time limit. *See* 8 U.S.C. §§ 1158(a)(2)(B), (a)(1). Once it became clear that no exception applied, her application had to be rejected as time-barred. Evidence going to the merits of the application – such as Petitioner's story about the stabbing – was of no consequence, no matter how persuasive or compelling it might have been. Such evidence was totally incapable of influencing the decision makers, and therefore it was not material. From all this there is but one logical conclusion: because petitioner's statement was not material, it was an error of law to conclude that her application was frivolous.

Upon review of the *Luciana*, *Id.* decision, it is clear that the court's decision is based upon fundamental fairness as well as basic jurisdiction.

In the paragraph quoted above, the court clearly states that if an asylum application is time-barred, the court has no option but to reject the application, no matter how compelling Petitioner's story may be. Essentially, the time bar creates a situation where the courts cannot consider anything to do with asylum, good, bad or frivolous.

The time bar rule acts to divest the court from having jurisdiction to consider anything to do with an asylum claim. To reach any other conclusion would essentially allow immigration courts to pick and choose how and when to consider utilizing the time bar rule to accomplish a desired outcome.

A detailed review of the statutes in question confirms the lack of jurisdiction argument – 8 U.S.C. § 1158(a)(2); § 208(a)(2) of the INA states as follows:

> (a) **Authority to Apply for Asylum**
>
> **(1) In general**
>
> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

Clearly, this statute allows for filing of an asylum claim; however, there are four (4) limitations under 8 U.S.C. § 1158(a)(2); § 208(a)(2) of the INA. The relevant limitation in this case is 8 U.S.C. § 1158(a)(2)(B), which states as follows:

> **(B) Time limit**
>
> Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

The essence of these two statutes, read together, indicates that if there is a "time limit" issue, the alien does not have the authority to apply for asylum. Once it is determined that an alien does not have the "authority to apply for asylum," it means that an asylum application has not been filed and a frivolous finding becomes impossible.

Upon review of the Decision of the Sixth Circuit herein, it is clear that they relied upon the language of 8 U.S.C. § 1158(d)(6) concluding that statutory language allowed the frivolous finding on a time-barred asylum application. Specifically this paragraph states as follows:

> (6) Frivolous applications
>
> If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph

> (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

The above statute specifically describes that a frivolous finding may be made assuming that notice was properly given to the applicant when an asylum application is actually made. In this case however because of the earlier statutory definitions regarding time limits, Petitioner's Asylum Application was never actually filed with the Immigration Court. This is based upon the ruling of the Immigration Judge that the Petitioner had not established change of country conditions and as such the asylum application was in fact time-barred.

The Sixth Circuit justifies its decision by citing immigration regulations, to-wit: 8 C.F.R. § 1208.20 which allows an immigration judge to make a determination of a frivolous application. The Court then indicates that *Chevron* deference applies to this case in that the Board's interpretation of the Immigration & Nationality Act should be given deference to ambiguous statutory terms. Citing *Nagusi v. Holder*, ____ U.S. ____ 129 S. Ct. 1159 (2009). See also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984). The problem with the Sixth Circuit Court's Decision is that the statutes in question are not ambiguous in any way, shape or form. The rules and regulation regarding the ability to file an asylum application are clearly stated in 8 U.S.C. § 208 et seq. If your application is time-barred and you are unable to establish changed country conditions, there is no ability to file an application for

asylum. There being no asylum application, a frivolous finding is not possible.

The Sixth Circuit then goes on to consider two cases to support their position.

The first case is *Lazar v. Gonzalez*, 500 F.3d 469 (6th Cir. 2007), in which this Court ruled that a withdrawn asylum application can still result in a frivolous asylum finding. Petitioner believes that this Court's decision is correct but has relevance to this case. In *Lazar, Id.*, the asylum application was in fact filed pursuant to 8 U.S.C. § 1158(a)(2); § 208(a)(2) of the INA, and none of the four (4) exceptions listed under 8 U.S.C. § 1158(a)(2); 208(a)(2) of the INA applied to the *Lazar* case. *Id.* As such, the Immigration Judge did in fact have jurisdiction to consider the asylum case and the related frivolous issue.

Unlike *Lazar*, Petitioner never had authority to even apply for asylum, due to the time bar. As a result, the Immigration Judge could not find that a frivolous asylum application was filed as no application was filed.

The second case that Respondent is likely to rely upon is *Mingkind v. U.S. Attorney General*, 468 F.3d 763, 768 (11th Cir. 2006). In that case, the Eleventh Circuit ruling was based on a different jurisdictional argument, citing the Code of Federal Regulations for the proposition that an immigration judge has sole jurisdiction over applications for asylum. 8 C.F.R. § 1003.14(b). (*Mingkind Id.* at pg 767-768).

A review of the *Mingkind* decision, *Id.*, fails to reflect that consideration was given to the arguments made in this case. Upon review of the *Mingkind* decision, *Id.*, it appears that they were persuaded by what they perceived as congressional intent to prevent frivolous asylum filings and the need to impose a sanction. *Mingkind Id.* at pg 768).

In fact, Congress has placed no such penalty upon either of the other two (2) types of relief for which Petitioner filed, to wit: Withholding pursuant to 8 U.S.C. § 1231(b)(3); § 208(b)(3) of the INA; and Withholding under the Torture Convention. Certainly Congress could have imposed a similar frivolous penalty in either of those situations had it so desired.

As to this issue of sanctions, the *Luciana*, *Id.*, court stated as follows:

> In the case at bar, the Immigration Judge found Petitioner to have committed a serious wrong: she ratified a false statement contained in her asylum application. This is a wrong we cannot condone. Immigration proceedings, like almost all legal proceedings, depend on the ability of decision-makers to find the truth. Lies undercut immigration proceedings just as they do proceedings in state and federal court. Without the truth, the judicial edifice turns to a house of cards.
>
> But Petitioner's misdeed will not go unpunished. Her asylum application has been denied. The IJ's order for her removal – issued, ultimately, because she voluntarily came forward to apply for asylum – stands. Any possibility she has of ever living legally and

permanently with her family in the United States now hangs on the willingness of the Attorney General to grant her a waiver. Such waivers are far from a certainty. *See, e.g., Howell v. INA*, 72 F.3d 288 (2d Cir. 1995) (holding that a district court lacked jurisdiction to review the Immigration and Naturalization Service's refusal to grant a waiver of a ground of inadmissibility in the case of a Jamaican woman married to a U.S. citizen. (*Luciana* at p. 284)

Petitioner herein will face a similar situation. Although an Immigrant Petition is now available to him, he will face difficulties in obtaining permanent resident status, either before the Immigration Judge (likely to be the same judge) or from the Department of Homeland Security should he proceed administratively in the United States or abroad.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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